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April 27, 2004

Ms. Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street S.W. Suite TW-A325
Washington, D.C. 20554

Re: RM-10865 - In the Matter of United States Department of Justice, Federal Bureau of Investigation, and Drug Enforcement Agency Joint Petition for Rulemaking to Resolve Various Outstanding Issues Concerning the Implementation of the Communications Assistance for Law Enforcement Act.

Dear Ms. Dortch:

Pursuant to the Commission's March 12, 2004 Notice (DA No. 04-700), please find enclosed the Reply Comments of New York State Attorney General Eliot Spitzer.

Sincerely,

Michael Berlin
Assistant Attorney General

Enclosure: Reply Comments of NYS Attorney General

cc: Natek, Inc.
9300 East Hampton Drive
Capitol Heights, MD 20743

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
United States Department of Justice, Federal Bureau)
of Investigation, and Drug Enforcement Agency)
) RM-10865
Joint Petition for Rulemaking to Resolve Various)
Outstanding Issues Concerning the Implementation of the)
Communications Assistance for Law Enforcement Act.)

Reply Comments of Eliot Spitzer
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INTRODUCTION

The Office of New York State Attorney General Eliot Spitzer (“NY OAG”) hereby submits these reply comments pursuant to the Federal Communications Commission’s (“FCC” or “Commission”) request for comments on the Joint Petition for Expedited Rulemaking submitted by the United States Department of Justice, Federal Bureau of Investigations and Drug Enforcement Agency, dated March 10, 2004 (“Petition”).

In their comments, many commentators minimized the needs of law enforcement. They contend that the relief requested in the Petition is unnecessary because: (1) law enforcement already has statutory authority to conduct intercepts; (2) they have not received a significant volume of warrants for interception of conversations occurring over untappable technology; and (3) they already are cooperating fully with law enforcement without being legally obligated to do so. As detailed below, their comments are ill-founded and belie the significant obstacles faced by law enforcement in its attempt to protect the public.

Importantly, the NY OAG is not seeking to relax the properly stringent legal standards for obtaining an eavesdropping warrant. Instead, the NY OAG asks only that the FCC enforce CALEA in order to fulfill the statute’s goal: preventing law enforcement from slipping backward due to technological change.

ARGUMENT

First, certain telecommunications carriers and other commentators maintain that the actions sought in the Petition are unnecessary because law enforcement already has all the legal eavesdropping authority it needs.¹ This argument is a red herring. At issue here is not the legal

¹ See Comments of AT&T Corp. at 7 (“[t]he bottom line is that Petitioners currently possess the authority needed to obtain lawful intercept authorizations for the services that are the subject of the Petition, and they have used this authority to obtain necessary surveillance with respect to services and technologies that are outside CALEA’s coverage”); see also Comments of United States Telecom Association at 11 (“USTA contends that there is

authority to *obtain* an eavesdropping warrant but rather the practical technical ability to *execute* the warrant. As fully set forth in the NY OAG's initial comments, the telecommunications carriers' continual introduction of new, untappable products² significantly undermines law enforcement's ability to execute a warrant.³ This gaping technological hole provides terrorists and criminals with the means to conduct their conspiracies free of monitoring by law enforcement agencies. Experience shows that criminals, particularly sophisticated ones, quickly find and exploit these holes.⁴ We are simply deceiving ourselves if we hope otherwise.

Second, certain privacy rights organizations and other commentators argue that the relief requested in the Petition is unnecessary because the carriers have received few warrants for interception of untappable technology.⁵ This is unsurprising. As fully set forth in the NY OAG Comments, obtaining a warrant is a painstaking, resource intensive, and time consuming process. It requires developing probable cause and establishing that all other investigative tools have been exhausted.⁶ As a practical matter, an assistant attorney general who investigated a matter for months

no need for such rules to monitor and enforce CALEA compliance because the FCC already has adequate enforcement provisions and penalties to handle non-compliance"); Comments of Worldcom, Inc. d/b/a MCI at 3 ("These statutory authorities provide law enforcement powerful tools to perform lawful interception of targets that use services provided by telecommunications and information service providers alike, even in the absence of CALEA requirements").

²See Petition at 8 (many carriers "roll out new services with minimal if any interception capabilities").

³See Comments of Eliot Spitzer Attorney General of the State of New York ("NY OAG Comments") at 10-11.

⁴See Affidavit of J. Christopher Prather, Deputy Attorney General, Statewide Organized Crime Task Force, sworn to April 12, 2004 at ¶ 14 ("Prather Aff."), attached as Exhibit A to the NY OAG Comments.

⁵See Comments of ISP CALEA Coalition, at summary, ("Given the relatively small number of traditional intercept orders served on ISPs and online service providers, there is no policy basis for extending CALEA to cover their services."); Comments of Center for Democracy & Technology at 2 ("So far there is no evidence that there is an interception problem whose solution would require an extension of CALEA to the Internet"); Comments of Electronic Frontier Foundation at 3 ("The FBI petition presents no evidence that today's communications system materially affects law enforcement's ability to investigate crimes").

⁶NY OAG Comments at 8.

to obtain a warrant for a device known to be untappable would not long remain in charge of an investigation. The argument is truly ridiculous, as it posits law enforcement wasting not only its own time and resources, but the courts' time and resources as well.

Third, the carriers rely on their alleged cooperation with law enforcement to suggest that enforcing CALEA as demanded in the Petition is unnecessary.⁷ Voluntary cooperation by the companies, they claim, will ensure law enforcement access where it is actually needed. A decade of non-compliance, coupled with the carriers' continued roll out and marketing of untappable products, however, show the futility of relying on "voluntariness" here. Indeed, it is precisely the "voluntary" approach that has gotten us to our current state, one in which criminals and terrorists are able to communicate with impunity. There is no viable alternative but for the FCC to act now.⁸

⁷See e.g., Comments of the Voice on the Net Coalition at 16 ("Law Enforcement already has access to most of the information to which it is entitled under CALEA and VoIP providers have demonstrated a willingness to cooperate with Law Enforcement to address deficiencies in such information"); Comments of Worldcom, Inc. d/b/a MCI at 6 ("MCI's ISP units have cooperated fully and expeditiously with law enforcement, even without CALEA requirements, and will continue to do so with respect to each of its IP-based services").

⁸A number of commentators mistakenly read CALEA as giving the exclusive power to adopt and enforce deadlines for compliance to the federal courts. See Comments of BellSouth Corp. at 18; Comments of ISP Coalition at 33; Comments of AT&T at 21; Comments of Worldcom Inc. d/b/a MCI at 28; Comments of Cellular, Telecom & Internet Assoc. at 18. This is simply not the case. Pursuant to 47 U.S.C. § 1006(b), the Commission is empowered to set by rule technical requirements and standards to be followed by carriers for both existing technologies and bringing new products to the market. It is apparent that Congress, relying on the expertise of the Commission in matters of communication, delegated to the Commission the power to adopt and enforce deadlines for compliance. The mere fact that Congress also allowed aggrieved parties and the Commission the alternative to seek the intervention of the Courts is not a bar on the Commission's enforcement capabilities.

CONCLUSION

Telecommunications carriers and other commentators ask the FCC to continue business as usual. Too much is at stake for another decade of regulatory debate. The Commission should exercise its authority to act now in order to assure that new technologies are subject to CALEA and that as new services are developed, they contain eavesdropping capability.

April 27, 2004

Respectfully submitted,

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